

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. 436-20-0885-D7
LICENSE NO. 427873
Issued to: Virgil Edward McCoy

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2078

Virgil Edward McCoy

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 31 March 1976, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's seaman documents for 12 months outright upon finding him guilty of misconduct. The specification found proved alleges that while serving as a third assistant engineer on board the United States SS DELTA MAR under authority of the documents above captioned, on or about 20 January 1976, Appellant wrongfully failed to perform his duties due to being under the influence of intoxicants.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduce in evidence entries from the shipping articles and the official log as well as the testimony of the Chief Engineer.

In defense, Appellant did not offer any evidence although he did testify concerning his sailing record.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents, issued to Appellant, for a period of 12 months outright.

The entire decision and order was served on 7 April 1976. Appeal was timely filed on 12 July 1976.

FINDINGS OF FACT

On 20 January 1976, Appellant was serving as a third assistant

engineer on board the United States SS DELTA MAR and acting under authority of his license and documents while the ship was in the port of Santos, Brazil. On this day at 1100 hours the Chief Engineer, investigating loud noises emanating from Appellant's quarters, observed Appellant in an intoxicated state. The Chief Engineer considered Appellant to be in an unfit condition to stand his upcoming engineering watch and so indicated same to Appellant. He made no reply nor any statements at this time to the Chief Engineer. Appellant was logged on the same day for failure to stand his watch and did not make any comment when the log entry was read to him.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the evidence presented by the Coast Guard was not reliable nor probative to support a finding that the charge against Appellant was proved.

APPEARANCE: Kierr, Gainsburgh, Benjamin, Fallen & Lewis by George S. Meyer, Esq.

OPINION

I

Appellant's entire argument revolves around the contention that the facts were insufficient for the Chief Engineer to conclude that he was intoxicated and, therefore, the Judge erred in relying upon his testimony. Commandant's Appeal Decision Number 1736 (CASTILLO) in commenting upon a similar issue stated that:

"It is for the trier of facts to determine the credibility of witnesses, and absent a clear showing of arbitrary and capricious action, his determination will not be disturbed."

As the trier of fact, it was within the province of the Judge to determine that the Chief Engineer, an individual with 34 years of experience at sea and in the command of men, could reasonably ascertain that the Appellant was intoxicated. Further, the facts and circumstances as described by the Chief Engineer were never challenged nor contradicted by the Appellant. Therefore, the Judge's decision that the testimony of the Chief Engineer was of a reliable and probative nature must be upheld. This alone is adequate to find the charge proved.

II

Appellant also fails to recognize the fact that the Judge had before him an official log entry which is regarded as substantial

evidence in support of the charge as a matter of law. The entry stating Appellant's failure to stand watch was entered into evidence and was considered substantially in compliance with the requirements of 46 U.S.C. 702. See also, 46 CFR 5.20-107.

This rule of evidence was enunciated in Commandant's Appeal Decision Number 1784 (KARLSSON) where it was stated:

"The evidence on the merits adduced at the hearing comprised the articles of SEATRAN FLORIDA, which proved Appellant's service, and official log book entries made in substantial compliance with the statutes. The log entries were prima facie evidence of the facts recited therein, and constituted substantial evidence such as to support the Examiner's findings."

The failure to counter a prima facie case was discussed in Commandant's Appeal Decision Number 477 (BECKFORD) in which it was said:

"Thus, the Investigating Officer's prima facie case was based on a rebuttable presumption which is sufficient to establish the case so long as there is no substantial evidence to the contrary. Although the burden of proof did not shift, the effect of this prima facie proof was to put the burden on the Appellant of going forward with the evidence."

It is therefore concluded that the official log entry alone, unchallenged by Appellant, supports a prima facie case against him.

III

Appellant's contention that the order suspending his seaman's documents for 12 months outright is severe is not well taken in view of Appellant's prior record. He has an extensive prior record of misconduct dating back to 1956 which includes numerous warnings, suspensions, and probations. These appear to have had little, if any, effect on his performance. The latest order in 1974 was one of suspension for 12 months. The Judge was well within his authority to order an outright revocation and Appellant should be grateful to be given another opportunity to earn a living at sea. The order of the Judge is reasonable and consistent with the Coast Guard's responsibility for safety of life and property at sea.

CONCLUSION

It is concluded that the decision and order of the Administrative Law Judge is supported by reliable and probative

evidence, that the order is reasonable and not severe, and that the Judge was neither arbitrary nor capricious.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 31 March 1976, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 23rd day of Sept 1976.

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